



Citation for published version:

Garcia, M & Masselot, A 2015, 'EU-Asia Free Trade Agreements as tools for social norm/legislation transfer', *Asia Europe Journal*, vol. 13, no. 3, pp. 241-252. <https://doi.org/10.1007/s10308-015-0423-0>

DOI:

[10.1007/s10308-015-0423-0](https://doi.org/10.1007/s10308-015-0423-0)

Publication date:

2015

Document Version

Early version, also known as pre-print

[Link to publication](https://doi.org/10.1007/s10308-015-0423-0)

This is a post-peer-review, pre-copyedit version of an article published in *Asia Europe Journal*. The final authenticated version is available online at: <https://doi.org/10.1007/s10308-015-0423-0>

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EU-Asia Free Trade Agreements as tools for social norm/legislation transfer

This article builds on previous work which investigates the tension that exists between the EU internal and international legal obligations to achieve gender equality in all its activities, and the lack of actual implementation of this value in the context of trade negotiations with the Asian region. We argued that the EU's willingness to foster good economic relations with key rising markets in Asia together with the Asian countries' systematic rejection of the inclusion of norms in Free Trade Agreement create a double barrier for the diffusion of gender equality norms. We also concluded that the failure to insert gender equality norms within trade negotiations with Asian countries casts serious doubts about the credibility and the global reputation of the EU (Schimmelfennig 2001) as an international gender actor.

In this article, we consider the broader ambit of social norms diffusion in the context of trade negotiations between the EU and the Asian countries. We question the use of Free Trade Agreements as a tool for development and the exportation of social norms. As in the case of gender equality, the EU also has ambition as a global norm maker in the area of social norms. However, the EU's economic "nature" means that the promotion of economic growth and the priority of trade over other fundamental value can have an impact over the EU's ability and ambition as a social norm exporter.

This article confirms that Asian States demonstrate strong agency in resisting EU norms export's attempt. Previous empirical analysis of a broad range of cases of norm diffusion has showed that recipient Asian states of EU norms often actively and vociferously resists and rejects such norms (Garcia and Masselot 2014; Shen 2014; Chaban, Kelly, Holland 2014). Asian States are far from subdued norm-takers and stand their ground when dealing with the EU.

In order to explore these points, this article is organised into 4 parts. In the first part, the article traces the development of the EU social values. It also looks at the externalisation of these social values. In particular, it pays attention to the EU relationship with the International Labour Organisation (ILO). The second part addresses the tension that exists between the EU's interests and its values. In a third part, the article considers the examples of positive outcomes in terms of social

clauses resulting from the trade negotiations. It also addresses the difference in approach from the EU and its partners. Finally, in the last section, this article outlines the Asian States resistance to adopting social clause in the normative field.

Social Values of the EU – the internal story

Despite a spasmodic development, the social dimension is today a fundamental aspect of the EU. At the outset of the European integration project, it was expected that the creation of a functioning common market would generate a more harmonious social system. Therefore the ultimate aim for social policy was to facilitate economic integration. There was no specific requirement for general harmonisation in the field of social policy. It was believed that the market would ensure harmonisation of social policies (but without social dumping). The Spaark (1956) and the Ohlin (1956) Reports concluded that there was no need for an interventionist social dimension except for certain measures against “unfair competition” - This was the case for equal pay between men and women (Bain and Masselot 2013) – or measures directly linked to the building of the common market such as free movement of workers, the improvement of employment opportunities for workers as well as the improvement of working conditions and improving living standards. It was generally believed that labour law was a domestic issue, and in fact this policy area remained a member state competence. For this reason, the European Commission could only propose Directives on social matters if these were directly linked to the elimination of barriers to the internal market, hence the involvement in areas related to people as labour, as opposed to a broader understanding of social policy as affecting citizens.

However, increasingly the European Commission took on a more entrepreneurial role in social policy matters, shifted due to the late 1960's social unrests; successive enlargements of the Community to include states with diverse sets of social systems (the United Kingdom, Ireland, Denmark and Norway) and the increasing view that the Community had to be seen as more than a device for business. It had become a necessity for the Community to develop a human face for its citizens.

As a result, the Social Action Programme adopted in 1974, led to increased legislative activity and harmonisation in the area of social policy. This included the adoption of the Equal Pay Directive; the Equal Treatment Directive; Directive on Social Security; a series of health and safety directives; a Directive on Mass Redundancies and the Directive on Transfer of Undertakings and Insolvent

Employers and well as the setting up of the European Regional Development Fund created to address the problem of socio-economic convergence in the Community.

The Single European Act 1986 extended qualified majority voting to Health and Safety matters. This facilitated the adoption of the Working Time Directive. It also allowed for an improvement of the developing dialogue between management and labour at European level (the so-called “social dialogue”), which would become quite important later in relation to the “collective strategy” and the adoption of the Parental Leave Directive.

Despite these amendments of the Treaty of Rome, the idea was still that the Community could not function properly without the agreement of its citizens. And European citizens needed a social approach to the EEC. At the same time unemployment was raising. There was fear of the open competition at European level with relocation of large firms. As a result, Jacques Delors lodged his plan for “L’Espace Social Européen” which eventually took the form of the Community Charter of Fundamental Social Rights signed in 1989 by all Member States except the UK. These rights were to be implemented through the Social Charter Action Programme, and any measures adopted were to be based on the European Community (EC) Treaty. The Action programme was ambitious and led to the enactment of some important pieces of social legislation such as the Directive on Proof of Contract of Employment; the Pregnant Workers Directive; the Directive on Posted Workers; and the Young Workers Directive.

From the Treaty of Maastricht to Amsterdam to Nice, the Social policy programme went from strength to strength. During the Maastricht negotiations there was pressure on Member States to expand the social competence of the EC. However, they still met with resistance from the UK. The Social Charter was therefore adopted in a protocol attached to the Treaty on the European Union (TEU) with an opt-out of the UK.

The Social Policy Agreement broadened the range of measures that could be decided on qualified majority vote (information and consultation of workers, equality between men and women, and integration of those excluded from the labour market) but it expressly excluded issues of remuneration; right of association; right to strike and the right to impose lockouts from EC competence. One of the important moves made by the Social Policy Agreement was to increase the

role of the Social Partners. In effect they receive power to agree the substance of directives such as the Parental Leave Directive. In addition, the TEU introduced the term of “Citizenship”, which under the Treaty of Maastricht had little substance. Nevertheless, “Citizenship” would include not only civil (basic freedom from State interference) and political (electoral) rights but importantly social rights (rights to health care, unemployment insurance, old pension, and welfare).

In 1997 Tony Blair’s Labour government in Britain opted back into the Social Chapter. This led to the incorporation of a Chapter on Social Policy in the Treaty and the Agreement on Social Policy which incorporated in the Treaty a new section on the “Union and Citizen”. The Treaty of Amsterdam introduced a new Chapter on Employment reflecting the concern of growing unemployment in the Union. However the States remained the main actors in the employment field. Nevertheless this represented a further shift in view: Social policy was to be an integrated part of EU Law. Additionally, a general non-discriminatory provision (Article 13) was included in the Treaty of Amsterdam.

On 7 December 2000, in a prelude to the Nice Inter-Governmental Conference, the European Parliament, the Council of the EU and the European Commission, acting jointly, issued the Charter of Fundamental Rights of the European Union in the form of a non-binding “solemn proclamation”. The recognition of the legal value of the Charter of Fundamental Rights in the Lisbon Treaty constitutes an incontestable advance in social matters. The Charter guarantees a number of fundamental social values including: workers' right to information/consultation within the undertaking (Article 27); right of bargaining and right to strike (Article 28); right of access to placement services (Article 29); right of protection for unjustified dismissal (Article 30); right to fair and just working conditions (Article 31); prohibition of child labour and protection of young people at work (Article 32); reconciling family and professional life (Article 33); social security (Article 34); health care (Article 35).

The Treaty of Lisbon also strengthens the social dimension of the European Union (EU) by recognising the social values of the Union in the founding Treaties and provides new objectives for social matters. These include full employment, social progress, the fight against social exclusion and social protection (Article 3 TEU) and high level of employment, adequate social protection and the fight against social exclusion must be taken into account in the development and implementation of Union policies (Article 9 TFEU). The later objectives are of application in the EU external policy.

The EU and international obligations

The EU is not only dedicated to social norms internally, it is also concerned with social issues on a global level as demonstrated by the close relationship between the EU and the International Labour Organisation (ILO). Although the EU, as an entity, is not a member of the ILO,¹ the two institutions have a special relationship based on strong cooperation. In July 2004 the ILO signed a Strategic Partnership Framework with the European Commission. The process leading to the signature of the Partnership generated several opportunities for closer dialogue between the two institutions and has resulted in a substantial volume of funds approved by the Commission for ILO implementation through a variety of channels. The EU also actively participates in discussions and negotiations at the institutional meetings of the ILO in Geneva. For example, the EU has played a key role in cooperating closely with emerging economies, developing countries and social partners during the adoption of the June 2008 ILO Declaration on Social Justice for a Fair Globalization.

For the purpose of our article, the EU and the ILO collaborate on external EU issues such as the cooperation between the EU and the Asian region, for instance through the Asia-Europe Meeting (ASEM). In the context of trade negotiations, the EU has urged Asian States to sign up to the ILO core conventions as part of the negotiations.

The relationship between the EU interest and its social clauses

Social norms under EU law have acquired a prominent position within EU policies. In the case *Deutsche Post/Sievers* case (1997) the Court of Justice of the EU held that the “economic aims are now only secondary to the social aims”. Nevertheless, the market and trade policy have always been in conflict with the social aims of the EU. This is linked to the historical, spasmodic and patchwork development of the EU social norms and well as its direct relationship with the market-making process. The uneasy relationship continues to create tensions, which also impact on the external policy of the EU.

Indeed, the EU sees itself as a world leader in relation to social values and it aims to diffuse these values to third countries as stated by the European Commission: “as we pursue social justice and

¹ The member states of the European Union are members of the ILO and signatory parties to most of the ILO conventions.

cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world.” (European Commission 2006, 5).

Jan Orbie et al. (2005) trace the incorporation of social clauses, in particular the demand that states ratify and implement the core ILO conventions, into EU external commercial policy. Initially, these matters appeared on the agenda in the context of discussions regarding the EU’s General System of Preferences (GSP) regime for granting trade concessions to developing states. As the World Trade Organisation (WTO) engaged the issue of labour standards in the failed Millennium Round, and in the Doha Round negotiations, these too featured more prominently in the EU’s trade policy. The authors suggest that increased international concern with this issue, as encapsulated in the ‘free trade versus fair trade debates’ (van Roozendaal, 2002, 67) coincided in time with the election of a series of social-democratic governments in Europe in the 1990s more sympathetic to these issues, and who were also faced with increased civil activism in favour of fair trade and concerns over rising European unemployment and social dumping effects of trade. As Cyvers and Kerremans (1998, 118) point out: “Suddenly the issue became problematic, which gives the impression that the real reason of the complaints is not ethical, but rather economic, i.e. a perceived need of protection of some of the interests inside the industrialised world.”

Partners’ negative perceptions of social clauses

The request that partners sign up to the ILO core conventions as part of the trade negotiation has not been taken up lightly by Asian States. The EU-Asia relationship was from the outset directly linked to the growing economic and political power of the region. The EU therefore is not acting from a strong stance in that regards.

Asian states have argued that developed states’ insistence on labour clauses in trade agreements reflect protectionist impulses. As Kevin Kolben (2006) demonstrates developing states have opposed this linkage at the WTO invoking claims of Western protectionism, with the West attempting to export high labour standards and costs to developing states thus limiting the outsourcing of jobs, and limiting job growth in developing states. It is this position that has been reflected even in trade union and civil society opposition to these linkages in India. Ole Elgstrom’s (2007, 959) interviews with developing states’ officials regarding their views of the EU as a trade negotiator in the WTO revealed their suspicions regarding the EU’s linkage of trade with social issues: ‘Many delegates seem to have difficulties in believing that this is not done without any ulterior motives and see behind these efforts a desire to introduce protectionism, ‘a new bias’, through the back door’.

Whilst another delegate from a developing country expressed his doubts by saying, ‘these initiatives on human rights and the environment could be positive – but they could also be skewed to give advantages to the West’ (In Elgstrom 2007, 959). The later statement reveals a difference, not so much on the values, but on the form and implementation of the values, which is consistent with concerns raised by non-trade union civil society groups, who likewise oppose the systematic linkage of trade preferences and social standards. Naila Kaber (2004), for instance, points out that the enforcement of labour standards through trade sanctions could increase labour market inequalities through a shift of jobs towards the informal sector where those labour-standards would not be applied²

The increased powers granted to the European Parliament in trade matters under the Treaty of Lisbon, have served to heighten Asian states’ concerns about the EU’s approach to linking trade and social values through the “*pasarelle* clause” or “essential clause” in the EU’s Political Cooperation Agreements (PCAs) or Framework Agreements (FAs) that the EU negotiates with third parties alongside the negotiations of FTAs. This clause conditions the application of all other agreements in the relationship (including the FTA) to respect for the essential values (human rights, rule of law) encapsulated in the clause. Since the 1990s this “essential clause” has been a key element of EU agreements with third parties.

However, some EU partners fear that the European Parliament may take a negative view of some of their policies, or even future policies they may wish to enact, and initiate procedures to enact the suspension of trade preferences under the FTA (interview, Brussels, 24 October 2013) through the use of this clause. In the case of negotiations with India, the European Parliament has repeatedly expressed the view that any FTA with India should include social clauses. The EP adopted a resolution on 26 March 2009 stressing respect for core International Labour Organisation (ILO) standards and norms on social and environmental governance. This has been reiterated by the resolution of 11 May 2011 that proposes the inclusion of “legally binding clauses on human rights, social and environmental standards and their enforcement, with measures in the event of infringement” (EP, 2011), a view reiterated by the EESC (2011).³ In particular, some issues that the

² These differences in approach have stymied various attempts to include labour standards at the WTO level. Instead at the 1996 WTO Singapore Ministerial meeting it was agreed that the ILO, and not the WTO, was the appropriate forum for discussions of labour standards. Unlike the WTO, the ILO lacks an enforceable dispute settlement mechanism.

³ The European Parliament has also stressed that in the interest of consistency and coherence the EU-Canada Framework Agreement and Comprehensive Economic and Trade Agreement (CETA) must also include the linkage, despite Canada’s aggressive opposition to this. At the time of writing CETA’s conclusion has been announced but the documents have yet to be made public.

EP would like to see include two of the most problematic ones: (i) compliance with eight core conventions of the ILO and four priority conventions, and (ii) adherence to internationally agreed environmental standards. These could be a potential deal breaker as far as India is concerned given India maintains that these are issues to be dealt at appropriate international for a (Khorana & Garcia, 2013).

Asian countries' concerns are not completely unfounded. Historical precedents explain, in part at least, the reluctance of Asian States to incorporate social clauses linkages into the FTA. As Hafner-Burton (2005, 610) shows these linkages do create the space for European actions, such as the threat of sanctions, which in itself can be sufficient to garner behavioural changes in partners. She uses the example of Pakistan, which had entered the EU's Generalised System of Preference (GSP), a scheme granting non-reciprocal preferential access to the EU market to imports from developing nations, to highlight the risk of threat:

The EC's generalized system of preferences (GSP) establishes protective labor conditions with Pakistan on the importation of certain industrial and agricultural products. Respect for worker's rights was established as a condition for tariff preferences. In 1995 the Trades Union Confederation mobilized against the government's use of forced child labor, and the European Parliament requested an immediate investigation of the misconduct. Although the European Commission deliberated a ban on imports to coerce new policies on child labor, it ultimately did not implement a ban. Rather, the Commission chose to pursue influence through the threat of a ban coupled with positive incentives for Pakistan's active participation in the International Labor Organization's (ILOs) program for the eradication of child labor (IPEC). During the proceedings, which continued into 1997, Pakistan introduced national legislation outlawing child labor as a direct response to the investigation, and subsequently supplied the Commission with regular information of the government's efforts to implement the new human rights policies, which remain problematic but are under reform.

However, the strong conditionality that is featured in the GSP system is absent in the case of the FTAs and PCAs that the EU is negotiating with Asian states. The Agreements with South Korea (2011) and with Singapore (2013) incorporate the "linkage" for matters relating to core EU values of human

rights and rule of law.⁴ Issues relating to labour and environmental policies, as encapsulated in the sustainability chapter of the FTA, are operationalised in a less coercive and more collaborative fashion.⁵ The chapter is subject to a dispute settlement procedure whereby evidence of breaches in one party can be brought forward by the other party, but also by business and civil society from either of the two parties. Asian states have reacted variously to the incorporation of civil society in these mechanisms, however, as the EU is willing to accept its partners' definitions for proposed civil society groups, the issue has not hampered ongoing negotiations (interviews, Brussels, October 2013). Once a complaint is brought forward, the Joint Council of the Agreement then appoints a panel made up of three experts who will deliberate on the basis of the evidence presented and propose a non-binding plan of action based on best practices. In other words, in their present form it would be impossible to use this mechanism to unilaterally suspend trade privileges granted under the FTA. This notwithstanding, the European Parliament has made a call for 'binding' social clauses to be incorporated in the EU-India FTA. It seems unlikely that the European Commission's negotiators will deviate from the procedures they have agreed with South Korea and Singapore, however, the European Parliament has to ratify any external agreement the European Union negotiates, so they will be a key player in future negotiations.

Positive outcomes and difference in approach

The inclusion of social clauses in FTAs and in the negotiations can, however, help to effect change in partners by normalising discussions on a particular issue area. In the course of negotiations for an EU-Malaysia FTA and PCA, the EU's insistence on the need for the parties to join the ILO core conventions led to an internal review of labour legislation in Malaysia. Malaysian authorities and law-makers were forced to consider why their country had not signed the core conventions. Some policy-makers initially thought it was their positive discrimination policy for civil service recruitment that had precluded them from signing the equality convention. However further investigation revealed it was laws from the 1950s preventing women from working in certain sectors that made signing the conventions incompatible with domestic legislation. Most civil servants and authorities were unaware of the law, as in practical terms it had become out-dated, and is no longer implemented. Having detected this matter, the legislative procedures have been put in place to repeal the law and enable Malaysia to sign up to the ILO's core conventions (interview, Brussels, October 30, 2013). As this instance reveals, it is not always a case of partners' rejecting EU values or

⁴ It is broadly interpreted that the clause will only be invoked in a case of a strong deterioration of the status quo at the time of the agreement. Singapore, for instance, still has the death penalty in the statute books, even though no execution has taken place since 2009.

⁵ As no cases have been brought forward yet we cannot assess the level of commitment of the parties and how significant the issue of expert advice and peer pressure will be in enacting behavioural and policy change.

norms, but merely a difference of approach to the same issues. Malaysia's absence from the ILO core conventions was not determined by the prevalence of labour practices in breach of the conventions, but merely anachronistic laws and inertia.

The request to insert social clause into trade negotiations also reveals differences in approach between the EU and the Asian partners. The EU's current FTAs and Political Cooperation Agreements, offer a 'light touch' approach to the matter, by encouraging dialogue and cooperation on these issues, and encouraging partners to sign the ILOs four core conventions. Emile Hafner-Burton's (2005, 595) work on preferential trade agreements and human rights suggests that 'PTAs are more effective than softer human rights agreements (HRAs) in changing repressive behaviors', but only when they 'supply the instruments and resources to change actors' incentives to promote reforms that would not otherwise be implemented' in terms of coercive measures. In the case of EU FTAs and PCAs the only real coercive measure is the 'essential clause' which links all agreements to respect for human rights, but not labour standards, for instance.

If in the Malay case, compliance with EU ILO demands has been possible, and even if this is a desirable outcome for Malay authorities, it does highlight an important difference in the Asian and European approach. The EU approach is based on the institutionalisation of rules, and the incorporation into domestic law of international principles and commitments (the ILO conventions being a case in point). Asians, however, prefer to discuss and cooperate on these matters, More crucially they reject the bundling of these matters into negotiations on trade. Non-European diplomats from Asian states expressed their governments' reluctance to negotiate trade alongside matters that are not strictly trade issues in their eyes. Lax environmental and labour regulations can have a downward effect on production costs, which may offer an incentive for firm relocation and establishment in a particular jurisdiction. To prevent competitive pressures from generating a downward spiral effect on labour rights and environmental rules across jurisdictions, developed states insist on the inclusion of labour and environmental clauses in their FTAs with all other partners, including developing states.

Conclusions

Based on previous experience with the EU, Asians States are wary and resist the introduction of social clause into trade negotiations.

Precedents for this can be found within the EU's General System of Preferences with Pakistan as Emile Hafner-Burton (2005, 609). In this case the EU did not even implement the trade penalties, instead the threat of implementation sufficed to change the Pakistani's government position.

However, a significant qualification exists in the case of the EU's reciprocal FTAs. In these the mechanisms for the enactment of the social clause are not as automatic and EU dominated as in the case of the conditionality applied in the GSP system. In FTAs the social and environmental clauses operate by mutual agreement with the other party. If one party provides evidence of breaches of the clause the matter will be examined by a panel of experts (agreed by the parties to the FTA), and the panel will make recommendations. These are not legally-binding. The mechanism that has been put in place is a dialogue-based one, with broad participation of both policy-makers and business and civil society.

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